SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, ~~1952~~ 1953

No. ~~687~~ 22

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY,

Appellant,

vs.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA AND CITY OF LOS ANGELES

APPEAL FROM THE SUPREME COURT OF CALIFORNIA

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

RAY L. CHESEBRO,
City Attorney,
ROGER ARNEBERGH,
Assistant City Attorney,
BOURKE JONES,
Assistant City Attorney,
Counsel for Appellee,
City of Los Angeles.

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, A CORPORATION,
Petitioner-Appellant,

vs.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, AND CITY OF LOS ANGELES, A MUNICIPAL CORPORATION,
Respondents-Appellees

STATEMENT IN OPPOSITION TO APPELLANT'S ASSERTION OF JURISDICTION AND MOTION TO DISMISS OR AFFIRM BY APPELLEE, CITY OF LOS ANGELES.

The City of Los Angeles, a municipal corporation, one of the appellees in the above-entitled cause, respectfully shows the following in opposition to appellant's assertion of the jurisdiction of the Supreme Court of the United States and in support of this appellee's motion to dismiss or affirm:

I

Issue on Appeal

Appellant's contention on appeal is that a railroad company's share of the allocated cost of a grade separation must be based upon benefit to the railroad arising from the absence of a crossing at grade at the point involved. Appellant relies upon *Nashville, Chattanooga & St. Louis Railway* v. *Walters* (1935), 294 U. S. 405. The California Public

Utilities Commission held that under the exercise of the police power, "a state may regulate the crossings of railroads with its highways, and may require grade separations to be erected and maintained, apportioning the costs in the exercise of its sound discretion"; citing, *Erie Railroad Company* v. *Board of Public Utility Commissioners* (1920), 254 U. S. 394; *Chicago, Milwaukee and Saint Paul Railway Company* v. *Minneapolis* (1914), 232 U. S. 430; *Missouri Pacific Railway Company* v. *Omaha* (1914), 235 U. S. 121; and *Lehigh Valley Railroad Company* v. *Board of Public Utility Commissioners* (1928), 278 U. S. 24.

II

The Validity of a State Statute Is Not Involved in This Appeal

The assignment of errors and statement as to jurisdiction shows that appellant's attack is not upon the order of the California Public Utilities Commission authorizing the city to widen and increase the height of the existing underpass. Appellant's attack is confined to the condition therein that the cost of the improvement be allocated between the city and appellant in the manner stated. That portion of the order under attack by appellant is not legislative in character and is not a statute of the state within the meaning of section 1257(2) of Title 28 of the United States Code. Instead it is a judicial determination under the organic law of California.

The authorities relied on by appellant do not support its contention that the statute involved in this case is the order of the California Public Utilities Commission. In the first case cited, *Lake Erie & Western Railroad Co.* v. *Public Utilities Commission* (1919), 249 U. S. 422, the appeal by the railroad attacks an order of the Public Utilities Commission requiring it to restore a spur track to a grain

elevator, whereas in the case at bar the attack is directed only to the matter of allocating costs. The second case, *Live Oak Water Users' Association* v. *Railroad Commission of California* (1926), 269 U. S. 354, involved an order fixing rates for service, thereby prescribing a rule relating to future service supplied by the utility. The third case, *Hamilton* v. *Regents of the University of California* (1934), 293 U. S. 245, involved an order of the Regents requiring students to take military training. As stated by this Court, at page 258, speaking through Mr. Justice Butler, "the assailed order prescribes a rule of conduct and applies to all students belonging to the defined class." In the case at bar the order complained of does not have the essential characteristics necessary to meet the requirement of legislative character present in the foregoing cases cited by appellant.

In the language of *Ross* v. *Oregon* (1913), 227 U. S. 150, 163:

> "Of course, the ruling here in question was by an instrumentality of the state; but as its purpose was not to prescribe a new law for the future, but only to apply to a completed transaction laws which were in force at the time, it is quite plain that the ruling was a judicial act, and not an exercise of legislative authority. As was said in *Prentis* v. *Atlantic Coast Line Co.*, 211 U. S. 210, 226, 53 L. ed. 150, 158, 29 Sup. Ct. Rep. 67: 'A judicial inquiry investigates, declares, and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and end. Legislation, on the other hand, looks to the future, and changes existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power.'"

Under California law the allocation of costs is a judicial determination made by the Public Utilities Commission.

Appellant alleged in its petition for writ of review in the

California Supreme Court that the "Public Utilities Commission of the State of California, was and now is an administrative and quasi-judicial tribunal, created and existing under and by virtue of Sections 22-24 inclusive of Article XII of the Constitution of the State of California and by virtue of the Public Utilities Code and Public Utilities Act of California." (Par. II, p. 2)

Appellant also stated at page 61 of its point and authorities attached to its petition for writ of review, that

> "* * * Admittedly the underpass structures have become inadequate for vehicular traffic on Washington Boulevard and because of faster traffic, more traffic, and larger, wider, and higher trucks there is danger that trucks may scrape the sides of the underpass structure, but the change in the use of highway and in the types of vehicles using it and faster traffic have created this danger, not the railway."

The situation presented in the case at bar is quite similar to that which was before the California Supreme Court in *Postal Telegraph-Cable Co.* v. *Railroad Commission* (1925), 197 Cal. 426. In that case the Postal Telegraph-Cable Co. made "application for a review of that portion of an order made by the Railroad Commission whereby petitioner was allowed one-half of the cost of relocating a portion of its telegraph line in certain areas in which it is closely paralleled by a high-power transmission line operated by the Pacific Gas and Electric Company, in order to prevent induction interferences to petitioner's telegraph line which, by reason of its close proximity to the power line of the Pacific Gas and Electric Company, renders induction unavoidable." In affirming the order it was said in part, commencing at page 435:

> "Neither is the right of the Commission to compel the petitioner to relocate its lines challenged. It is

conceded by petitioner that if the Commission had made an order requiring petitioner to relocate its lines and had assessed the power company with the entire cost of such relocation, it would have been a valid order and the Commission's authority in such a case would have been regularly pursued. In other words, the jurisdiction or power of the Commission to determine the question it had taken hold of depended—in the view of petitioner—upon whether it had acted wisely or unwisely in the determination of the issue submitted. Such, of course, cannot be the rule. Failure to make an equitable apportionment of costs would constitute nothing more than error of judgment."

* * * * *

"Said public utilities having failed to agree upon a division of the costs of the removal or relocation of a fractional portion of petitioner's telegraph line and the cost thereof being a joint charge against both within the provisions of section 36 of the Public Utilities Act, and the Commission having fixed the proportion of the cost to be borne by each at one-half of the total cost of said change, and inasmuch as it cannot be said that the Commission acted arbitrarily or oppressively in the premises, its order must be affirmed even if it should appear to us that the apportionment of costs in favor of the petitioner was not as large as we might have allowed, were we vested with jurisdiction to fix the amount." (pp. 438-439)

That the allocation of costs by the California Public Utilities Commission in a grade separation matter is a judicial determination is clear from the ruling of the California Supreme Court in *City of San Jose v. Railroad Commission* (1917), 175 Cal. 284. That case was before the California Court on certiorari to review an order of the Commission requiring a grade separation at a proposed street crossing. The City of San Jose conceded that if establishment of the crossing was proper there should be separation of grades, but attacked that portion of the order

apportioning the expense thereof, in part, upon the City of San Jose. The city claimed, in part, "that the Railroad Commission exceeded its authority and jurisdiction in determining that the City of San Jose should bear a proportion of the cost of this crossing." (p. 286) One of the arguments advanced by the city was, "that the statute does not in terms provide for service of process or notice of any sort upon the city or that the city's rights be examined at any hearing." In disposing of this contention it was said (pp. 290, 291):

> "* * * We do not regard the omission to provide definite process to bring the city before the commission at a hearing on the necessity for a safe crossing as being fatal to the acquirement of jurisdiction over the municipality by the commission. The latter is both a court and an administrative tribunal. As a judicial body it has by implication all the powers necessary for the exercise of its duty. The city of San Jose does not complain that it had no day in court. It had notice to appear; actually did appear and was heard upon issue joined and evidence produced; and it had opportunity for review of the judgment. But aside from the power to summon and hear parties in interest—one which is necessarily involved in the judicial authority enjoyed by the commission, section 53 of the Public Utilities Act confers upon it power to prescribe rules of practice and procedure."

That judicial powers have been deliberately conferred upon the California Public Utilities Commission was specifically declared by the California Supreme Court in the first case coming before it under the constitutional amendment providing for the commission, namely: *Pacific Telephone etc. Co.* v. *Eshelman* (1913), 166 Cal. 640, it being there said at page 650:

> "That judicial powers were with deliberation vested in the commission the language of the constitution and

of the legislative enactments following the constitution leave no doubt."

It is equally clear that what appellant refers to as a statute, the validity of which was assertedly drawn in question, is in fact a judicial determination, the correctness of which appellant challenges. Such being the case the appeal should be dismissed.

III

No Substantial Federal Question Is Presented

Appellant's sole reliance is upon *Nashville, Chattanooga & St. Louis Railway* v. *Walters* (*supra*), 294 U. S. 405. While appellant claims that the case is a departure from the earlier decisions of this Court, it is to be noted at the outset that the case cannot be so characterized. For, as stated on page 431, "no case involving like conditions has ever been found in any of the lower Federal courts; nor, excepting the case here under review, has any such been found among the decisions of the highest courts of any state." The grade separation there involved was required in order to provide an underpass for a new Federal-aid highway in a rural community of 1823 inhabitants located in a sparsely settled territory. There was little traffic on the highway. Five of the six trains operated daily each way passed between 10:00 o'clock P. M. and 6:00 o'clock A. M. when there was substantially no highway travel. The new highway and underpass were not for local transportation needs, but to serve as a link in the nation-wide system of super highways fostered by Congress in conjunction with the several states in the interest of commerce by motor vehicle. The existing grade crossing was not eliminated but remained to serve the local needs on the old street route. The trial court found that, "the decision to build this underpass, its location and construction was not in any proper sense

an exercise of the police power," and "did not involve an exercise of the police power any more than many other features of this project such as elimination of curves, grades, widening the pavement, *et cetera*."

The Tennessee statute involved authorized the State Highway Commission in its discretion to require the elimination of grade crossings in the interest of safety. But the statute, as pointed out by this Court (p. 412), "without conferring upon the Commission any discretion as to the proportion of the cost to be borne by the railroad requires the latter to pay in every case, one-half of the total cost of the separation of grades."

The trial Court held the statutory apportionment of costs unconstitutional under the special facts of the case. On appeal, the Supreme Court of Tennessee, as pointed out at page 414, "declined to consider the special facts relied upon as showing that the order and statute as applied were arbitrary and unreasonable; and did not pass upon the question whether the evidence sustained those findings." This Court declined to pass upon the sufficiency of the foregoing facts to sustain appellant's contention that the statute and order based thereon were arbitrary and unreasonable. The holding of this Court in that case was (p. 428):

> "The Supreme Court of Tennessee erred in refusing to consider whether the facts relied upon by the Railway established as arbitrary and unreasonable the imposition upon it of one-half the cost of the underpass. The promotion of public convenience will not justify requiring for a railroad, any more than of others, the expenditure of money, unless it can be shown that a duty to provide the particular convenience rests upon it."

The opinion goes on to state that, "state action imposing upon a railroad the cost of eliminating a dangerous grade crossing of an existing street may be valid although it

appears that the improvement benefits commercial highway users who make no contribution toward its cost." The qualification of this general rule which was possibly applicable to the facts in the *Nashville* case is stated as follows (pp. 430, 431):

> "But in every case in which this Court has sustained the imposition, the new highway was an incident of the growth or development of the municipality in which it was located. * * * And in every such case the municipality apparently bore the cost of constructing the new highway for which grade separation was required."

The case at bar does not have any of the aspects which would bring it within the limitation upon the general rule of liability announced in the *Nashville* case.

The California Public Utilities Commission states in its opinion on rehearing—and the record clearly supports it:

> "The grade separations are in the City in an area which constitutes one of the principal industrial districts. * * * In the instant case, the proposed widening of Washington Boulevard is to meet local transportation needs, and the City's contribution thereto must come entirely from local funds." [Appendix B, pp. 35, 46, Appl. Statement as to Jurisdiction]

The grade separation here involved is now accomplished by two structures carrying the railroad tracks, one built in 1914 and the other in 1926, which provide a roadway only 20 feet wide with no facilities for pedestrian travel through the underpass, and according to the specific admission of appellant, "have become inadequate for vehicular traffic on Washington Boulevard and because of faster traffic, more traffic, and larger, wider, and higher trucks there is

danger that trucks may scrape the sides of the underpass structure" (Pts. & Auth. Pet. for Writ of Review, p. 61).

That the exercise of the police power in its truest sense is involved in authorizing the removal of such structures is too patent to warrant any argument upon the proposition. Appellant says, "the change in the use of highway and in the types of the vehicles using it and faster traffic have created this danger, not the railway" (p. 61). The danger referred to is not the danger of colliding with a train, but colliding with a structure maintained within the street easement to support the railroad facilities. And, most significant of all is the obvious fact that the dangerous condition created by the present structures is also a natural incident to the growth and development of the City, and accords fully with the situations presented in the cases referred to by this Court at page 430 of the *Nashville* decision.

It may properly be said that the crux of the case at bar is simply the matter of requiring the appellant to remove its permanent structures located within the street easement, which constitute a hazard and impediment to the primary use of the street easement, namely for public travel.

The vice of appellant's reliance upon the remarks of Mr. Justice Brandeis in the *Nashville* case relative to changed conditions no longer warranting the imposition of costs for grade separations upon the railroad is that those remarks were directed to the Federal-aid highway system and the Federal legislative scheme for the furtherance of this new facility for through transportation. This is a matter wholly foreign to the case at bar. The case at bar comes squarely within the concession referred to in the *Nashville* case (p. 413) that, "the rule has long been settled that, ordinarily, the State may, under its police power, impose upon a railroad the whole cost of eliminating a grade crossing,

or such part thereof, as it deems appropriate"; reference being made in the footnote to sixteen decisions.

The *Nashville* case is not a reconsideration by this Court of the problem of grade separation after a long interval of time elapsing since its prior consideration of the question. In 1931 this Court considered the matter collaterally in affirming judgments of the California Supreme Court affirming an order of the California Railroad Commission requiring the construction of a union passenger station in Los Angeles, it being said in *Atchison, Topeka & Santa Fe Railway Co.* v. *Railroad Commission* (1931), 283 U. S. 380, concerning railroads: (p. 395)

> "They may be required at their own expense to construct bridges or viaducts whenever the elimination of grade crossings may reasonably be insisted upon, whether constructed before or after the building of the railroads."

The case at bar is an illustration of the true exercise of the police power justifying the exaction of uncompensated obedience by appellant and in no sense involves an improvement for the special benefit of any particular segment of the public of the nature involved in the *Nashville* case. This being so, appellant's persistent claim of arbitrary apportionment of costs not in consonance with benefits finds no support in any decision of this Court, and, in fact, raises no question that is not firmly foreclosed by the prior decisions of this Court.

Conclusion

Upon the foregoing, Appellee City of Los Angeles respectfully moves that the within appeal be dismissed or that the judgment and decree of the Supreme Court of the State of California be affirmed.

RAY L. CHESEBRO,
City Attorney,
ROGER ARNEBERGH,
Asst. City Attorney,
BOURKE JONES,
Asst. City Attorney,
Counsel for Appellee,
City of Los Angeles.

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